Minty Holdings Sdn Bhd v JB Properties Sdn Bhd (SK Brothers Realty, third party)

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-192 OF 1994
KAMALANATHAN RATNAM J
13 NOVEMBER 1998

Land Law — *Restraints in dealings — Caveats — Wrongful entry — Whether loss occasioned by entry*

Civil Procedure — *Damages — General damages — Claim for legal fees — Legal fees quantifiable — Whether plaintiff entitled to ascertained legal fees if order only relates to general damages*

The plaintiff's claim from the defendant for general damages to be assessed for wrongful entry of two caveats lodged by the defendant on the plaintiff's property was dismissed. On appeal to the judge in chambers, judgment was entered against the defendant and damages were ordered to be assessed. The learned senior assistant registrar awarded interest at 8% pa on the 90% of the balance purchase price and the legal fees of RM41,801.80. The defendant appealed against the award. The issue was whether the plaintiff suffered such loss or damages as a result of the wrongful lodgement of the caveat by the defendant.

Held, allowing the appeal:

(1) The onus was on the plaintiff to prove his loss. A claim for damages for wrongful entry of a caveat was no exception. In this case, the plaintiff had totally failed to prove any actual or real damages (see p 185H–I).

(2) Since the legal fees were quantifiable, the order of the learned judge should have included an order for special damages too. Since the order related only to general damages, the plaintiff had no right to make a claim for the ascertained legal fees which were in fact special damages (see p 186C); *RJ McGuinness v Ahmad Zaini* [1980] 2 MLJ 304 followed.

[Bahasa Malaysia summary

Tuntutan plaintif daripada defendan untuk ganti rugi am ditaksir untuk kemasukan salah dua kaveat yang dikemukakan oleh defendan ke atas hartanah plaintif telah ditolak. Atas rayuan kepada hakim dalam kamar, penghakiman dimasukkan terhadap defendan dan ganti rugi diperintahkan supaya ditaksir. Penolong kanan pendaftar yang arif telah mengawardkan faedah pada kadar 8% setahun atas 90% baki harga belian dan yuran guaman sebanyak RM41,801.80. Defendan telah merayu terhadap award tersebut. Isu adalah sama ada plaintif telah menanggung kerugian sedemikian akibat kemasukan salah kaveat oleh defendan.

A **Diputuskan**, membenarkan rayuan:

(1) Beban terletak pada plaintif untuk membuktikan kerugiannya. Suatu tuntutan untuk ganti rugi atas kemasukan salah kaveat tidak merupakan pengecualian. Dalam kes ini, plaintif telah gagal untuk membuktikan sebarang kerugian sebenar sama sekali (lihat ms 185H–I).

B

(2) Oleh kerana yuran guaman boleh dikira, perintah hakim yang arif sepatutnya termasuk suatu perintah untuk ganti rugi khusus. Oleh kerana perintah tersebut adalah berkaitan dengan ganti rugi am sahaja, plaintif tidak berhak untuk membuat tuntutan untuk yuran guaman yang sudah ditentukan yang pada hakikatnya

C merupakan ganti rugi khusus (lihat ms 186C); *RJ McGuinness v Ahmad Zaini* [1980] 2 MLJ 304 diikut.]

Notes

D For cases on wrongful entry of caveat, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2415–2419.

For cases on general damages, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1488–1491.

Case referred to

E *RJ McGuinness v Ahmad Zaini* [1980] 2 MLJ 304 (folld)

Legislation referred to

Rules of the High Court 1980 O 14

F

CB Liang (*Nga Hock Cheh & Co*) for the appellant/defendant.
Dennis Appaduray (*Sidek Teoh Wong & Dennis*) for the respondent/plaintiff.

Cur Adv Vult

G **Kamalanathan Ratnam J**:

Facts

The plaintiff in this case claimed from the defendant, inter alia, general damages to be assessed for wrongful entry of two caveats lodged by the defendant on the plaintiff's property. The first caveat was lodged on

H 3 November 1992 and cancelled on 21 January 1993. The second caveat was lodged on 15 January 1993 and cancelled on 27 September 1993.

The plaintiff had entered into a sale and purchase agreement with one Abdul Aziz bin Mat on 16 February 1993 in respect of the plaintiff's property at an agreed price of RM833,000. The terms, inter alia, were that 1% of the purchase price was to be paid upon the execution of the letter of

I offer and 9% upon execution of the sale and purchase agreement. The balance of the 90% was to be paid within 90 days from the date of signing of the sale and purchase agreement.

The plaintiff's application for summary judgment pursuant to O 14 of the Rules of the High Court 1980 was dismissed by the learned senior assistant registrar ('the SAR') on 22 May 1995. The plaintiff's appeal to the judge in chambers was allowed on 16 February 1996. Judgment was thus entered against the defendant and damages were ordered to be assessed together with interest thereon at 8% pa from date of judgment to date of realization with costs.

The hearing of the assessment of damages proceeded on 17 and 31 October 1996. The plaintiff's sole witness, one Haw Yuen Heong, gave both oral as well as affidavit evidence.

The plaintiff's claim

Before the learned SAR, the plaintiff prayed for:

(1) Interest at 8% pa on the initial 9% of the purchase price which was RM79,970 for a period from 8 October 1992 to 16 February 1993.

(2) Interest at 8% pa on the balance purchase price of RM749,705 from 8 January 1993 to 19 January 1994.

(3) Legal fees paid by the plaintiff to its solicitors amounting to RM41,801.80.

The decision of the learned SAR

Having heard the oral evidence and read the affidavits and the written submissions of the parties, the learned SAR awarded interest at 8% pa on the 90% of the balance purchase price of RM749,700 from 15 May 1993 to 15 December 1993 which amounted to RM35,492.65 and the legal fees of RM41,801.80.

Court's findings

Against this award, the defendant had appealed. The issues before me are simple and straight forward. I have to consider two issues:

(1) Whether the plaintiff did suffer actual or real damages as opposed to notional damages. If so then,

(2) whether the plaintiff suffered such loss or damages as a result of the wrongful lodgement of the caveat by the defendant.

Was there actual or real damage

For this, I examined the evidence given by the plaintiff's sole witness. She was the company secretary. Other than her own self-serving evidence that the existence of the caveat caused the delay in the purchaser paying the balance of the purchase price, there was a total lack of corroborative evidence.

It is in evidence that the 1% was paid on 26 September 1992 upon execution of the letter of offer. The evidence of the plaintiff was that the sale

A and purchase agreement was to be signed within 14 days thereafter, that is, on or before 10 October 1992. Instead, the agreement was only signed on 11 February 1993 when the balance of RM74,970 was paid. Again, there is no evidence before me that it was the existence of the caveat that caused this delay. In fact, even the learned SAR disallowed this item on the basis that there was no evidence to this effect. What is most puzzling is that the B agreement was executed on 11 February 1993 when the second caveat was in force. The sole witness for the plaintiff admitted that the purchaser was indeed aware of the existence of the caveat. Since the existence of the caveat was not reflected in the agreement, I cannot see how the plaintiff has suffered any damage as a result of the caveat.

C There is no other evidence before me that the existence of the caveat caused any delay either in the payment of the 9% or in the execution of the agreement.

As to the balance of 90% amounting to RM749,700, the purchaser had paid the same in two instalments. On 15 December 1993, he paid D RM249,700 and on 19 January 1994 he paid the balance of RM500,000. At least, an affidavit from the purchaser could have been tendered to substantiate the plaintiff's claim that the purchaser's delay in settling the balance was due to the existence of the caveat. As I said earlier, other than the self-serving narrative of the plaintiff's sole witness, there was no corroborative evidence.

E Indeed, a perusal of the sale and purchase agreement showed that the purchaser was bound to pay the balance purchase price of RM749,700 to the plaintiff's solicitors as stake-holders within 90 days from the date of signing the agreement which meant that the final date for settlement was 15 May 1993 since the agreement was signed on 16 February 1993. The F said agreement (cl 10) conferred upon the plaintiff the right to terminate the said agreement and to forfeit the deposit sum. The plaintiff however did not exercise this right nor did it explain why. Could there have been a secret bargain between the plaintiff and the purchaser to grant the latter the indulgence of late payment and for the plaintiff to thus proceed against this defendant. This court will never know in the absence of any evidence from G the purchaser. Suffice it for me to hold that since the plaintiff had the right to exercise the termination clause and had failed to do so, the plaintiff has thus failed to show any actual or real loss.

In any case, undisputed evidence showed that the second caveat was cancelled on 27 September 1993; and yet the purchaser was only able to H settle the balance sums on 15 December 1993 and on 19 January 1994. The learned SAR's decision to award interest on this sum from 15 May 1993 (that is, the expiry of the 90 days) to 15 December 1993 has no basis. In any event, since the defendant had withdrawn the caveat on 27 September 1993, there was no basis for awarding interest up to 15 December 1993.

Like every claim for damages, the onus is on the plaintiff to prove his I loss. A claim for damages for wrongful entry of a caveat is no exception. In my judgment, the plaintiff has totally failed to prove any actual or real damages.

Legal fees

This claim has been quantified and ascertained as amounting to RM41,801.90. I have read the judgment of my learned sister Zaleha Zahari J dated 16 February 1996. Having allowed the appeal from the learned SAR, she allowed summary judgment of the plaintiff's claim and ordered that general damages ought to be assessed with interest at 8%.

There is a clear distinction between general and special damages. As I said in my book *Nathan on Negligence* (1998 Ed) at p 342:

> Special damages belong to that category of damages that can be calculated into dollars and cents at the date of the trial.

In *RJ McGuinness v Ahmad Zaini* [1980] 2 MLJ 304, the court held that items of special damages must be specifically pleaded and if omitted, then the plaintiff must amend to include the items; otherwise no award would be made. In this case since the legal fees were quantifiable, the order of the learned judge should have included an order for special damages too. Since the order related only to general damages, the plaintiff had no right to make a claim for the ascertained legal fees which are in fact special damages.

In any case, since I have already held that the plaintiff has shown no nexus between the filing of the caveat and the delay in settlement by the purchaser, this claim for legal fees too must perforce be rejected.

In the circumstances, I allow the appeal with costs and set aside the judgment of the learned SAR.

Appeal allowed; judgment set aside.

Reported by Loo Lai Mee